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undergone to some degree the survival of the fittest — they have borne the test of time, while our statutes are too often born of emotions of the moment. But anachronisms do exist in the law. By the very nature of things our common law of today must represent the results of the economics of yesterday. When therefore a principle of the common law is obviously out of tune with the present, when indications, such as the popularity of remedial acts in other jurisdictions,²¹ the prevalence of similar acts on analogous points in the same jurisdiction,²² the probability that the principle was the result of procedural difficulties now swept away,²³ and the vindication of the change by the test of time²⁴ — when all these indications point the same way, it cannot be dangerous to let courts which have directed the growth of principles of law in the past, continue to obtain a systematic growth by treating such statutes as declaratory of a principle of law, and not merely a remedy for a class.²⁵

PROOF OF CONTEMPORANEOUS PAROL CONDITIONS IN THE LAW OF BILLS AND NOTES. — It is laid down in discussions of the law of bills and notes that "If a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted."¹ It should not be necessary at this time to set forth that this is only the court-room application of a rule of law that such a verbal agreement, if proved, is immaterial.² But stated even so, the variants of the general rule are so numerous as practically to call for a new classification, a demand which Dean Wigmore's synthesis ably fulfills.³ For the

directions which is the essence of that homely wisdom which makes life livable." Mr. Justice Holmes likewise gives indications of similar thought. In refusing to reverse a case on the ground that the plaintiff had refused to allow examination by the defendants' physician, the common law having no precedent on the point, he says: "It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case." *Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155, 159, 58 N. E. 686, 687.

²¹ Lord Campbell's Acts are existent in practically all jurisdictions today.

²² The somewhat analogous idea that actions of tort died with the wronged party has, as shown above, been swept away by 4 Edw. III, c. 7. The English Workmen's Compensation Act, 1906, § 7, shows the same tendency. See note 10.

²³ This is apparently the court's justification for the present decision. This argument that the rule, having had a basis when promulgated, was therefore good law, and so must be good law now, appears to be a nonsequitur. The language of Lord Parker that the House should not disturb a rule which, "however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds," is hardly soul-satisfying.

²⁴ Lord Campbell's Act was passed in 1846 (9 & 10 VICT. c. 93).

²⁵ An Illinois case brings out well the idea of treating a statute as a principle, together with a hesitancy to reach such result rashly. In *Groth v. Groth*, 7 Chicago L. J. 359, the court allowed the husband temporary alimony on a suit of divorce by the wife. This result had its basis in Married Women's Acts which had apparently laid down the principle of equality between man and wife. But the court justifies such conclusion drawn from the statute on the ground that not only today, but in Grecian times such equality existed, and it was only the temporary results of feudalism that had clouded the true light.

¹ 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 80.

² WIGMORE, EVIDENCE, § 2400, (1). See THAYER PRELIMINARY TREATISE ON EVIDENCE, 390.

³ WIGMORE, EVIDENCE, § 2443. Dean Wigmore divides the terms of the instru-

purposes of the present note,⁴ however, Dean Wigmore and the general rule are at one. Contemporaneous parol agreements independent of the instrument and conditioning the maker's liability thereon, are excluded in both statements of the law.⁵ And the difficulty arises from the fact that neither statement of the law is an adequate statement of the situation. A well-established line of decisions freely admits as against immediate parties the proof of agreements fixing certain conditions to the instrument.⁶ And no summary excluding all collateral conditions can be adequate.

Dean Wigmore of course recognizes the existence of this line of decisions and excepts it from the general rule on the ground usually taken by the courts and the text writers, *viz.*, that "a condition precedent to the existence of the obligation, *i. e.* an escrow," is always available.⁷ But it is difficult to see wherein this differentiation is effective either in application to the given case or in reasonableness. Although there may be a theoretical difference between a delivery in escrow to the payee, and a delivery to the payee to take effect *in praesenti* with a condition precedent to the obligor's liability, there is no difference in the legal effect of the two situations. The fact that in most jurisdictions⁸ the delivery is anomalously allowed to be made in escrow to the payee cannot change the rule of escrow delivery in general, *i. e.* that the delivery of a deed in escrow creates an obligation presently,⁹ etc. In either case there is an obligation outstanding which the parties have made dependent on a contingency. And in either case the payee can cut off the obligor's defense, based on the condition, by indorsement to a *bona fide* indorsee for value.¹⁰ And yet the Parol Evidence Rule is made to apply in the one case and to be ineffective in the other.

In other words a line is drawn between parallel situations to the

ment into terms expressed or variable, and terms fixed or implied. The expressed terms are not open to qualification; the terms implied by law may be qualified provided the transaction is such that the negotiable instrument form is peculiarly convenient for certain features, however inconvenient for others.

⁴ The present note is not concerned with cases where the instrument and the contemporaneous agreement are mutual and dependent and therefore to be construed together as one contract. *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451. See note to *American Gas, etc. Co. v. Wood*, 90 Me. 516, in 43 L. R. A. 449. There is no definite rule establishing a test for the "one-contract" interpretation, and it is often difficult to determine when the court will construe the instrument and the agreement together. See 43 L. R. A. 449, note, § III (b).

⁵ Dean Wigmore excludes contemporaneous parol conditions qualifying absolute instruments on the ground that, though the unconditional nature of a negotiable instrument is a term implied by law and hence variable under his formula (see note 3, *supra*), nevertheless if a condition was desired there was no prime necessity for the negotiable instrument form and the doors of his definition are closed. See WIGMORE, EVIDENCE, § 2444 (2). This seems to be a determined effort to fit the law to the formula.

⁶ *Seymour v. Cowing*, 4 Abb. App. Dec. (N. Y.) 200; *Beach v. Nevins*, 162 Fed. 129, annotated in 18 L. R. A. (N. S.) 288.

⁷ See WIGMORE, EVIDENCE, § 2444, n. 6 end. The same distinction is taken by the cases. *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105; *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985; *Shine v. Merville*, 1 Oh. App. 33, and cases under the Negotiable Instruments Law generally.

⁸ *Burke v. Dulaney*, 153 U. S. 228. See 1 DANIEL, 6 ed., § 68 a; NEGOTIABLE INSTRUMENTS LAW, § 16.

⁹ *Butter & Baker's Case*, 3 Coke 25 a; WARREN, CASES ON PROPERTY, 213.

¹⁰ *Gillette v. Hodge*, 170 Fed. 313.

exclusion of the true agreement of the parties on one side of the line. The distinction is made, as suggested above, on the purely academic ground of the differentiation between a completed and an obstructed legal act. Where the instrument is delivered in escrow to the payee there is at present no delivery, and hence no binding obligation, and hence no application for a rule which protects from qualification a binding legal instrument.¹¹ It may be admitted that such a distinction as that between completed and obstructed legal acts is valuable for purposes of analysis. It may be admitted that the distinction would be justified on that ground alone if it were applicable to the cases in any satisfactory manner. But, as is usually true of distinctions that do not distinguish, an application to the cases results in a hopeless confusion. If delivery in escrow to the payee, such as is generally allowed in the United States,¹² were true delivery in escrow, or if the parties expressly attached their condition to the delivery, the problem would be simple. But, unfortunately, escrow delivery to the payee bears no ear-mark and the parties themselves seldom do more than insert a defensive condition without specifying its application. The result is that the court must decide in the usual case on which side of an arbitrary line a floating condition belongs.

And the decisions are not altogether unimaginative. A parol agreement, accompanying the manual delivery of a note and providing for two renewals and a retransfer of the note thereafter on a stipulated contingency, has been held to constitute a conditional delivery.¹³ A parol agreement, contemporaneous with the manual tradition of a note, and providing that the note was not to be enforced unless the saloon fixtures for which it was given were disposed of, was held to attach to the maker's liability, not to the delivery.¹⁴ A parol agreement that the maker's liability on the note should be contingent on his receiving a sum due him was held to fall without the proscriptions of the Rule.¹⁵ But a parol agreement that payment was to depend on the maker's realizing on a sale of bonds, was held inadmissible.¹⁶

The general conclusion to be drawn from an examination of recent cases on the point is that it is well nigh impossible to decide from any given statement of facts whether or no the Parol Evidence Rule should apply. And it follows from such a conclusion that the criterion for the application of the Rule must be fatally indecisive and inept. The remedy seems almost too obvious to miss. Indeed it lies in the very source of the mischief. If delivery in escrow to the payee is to be allowed at all, then it must be open to the parties to fix any condition they desire as the condition on which delivery is to take place. And if this may be done there is no reason why the courts should not construe any condition that may be laid down prior to the obligor's liability as a condition going to

¹¹ *Beach v. Nevins*, 162 Fed. 129, in 18 L. R. A. (N. S.) 288.

¹² See note 8, *supra*.

¹³ *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841.

¹⁴ *Ebling Brewing Co. v. Feldman*, 114 N. Y. Supp. 910.

¹⁵ *Newgass v. Shulhof*, 128 N. Y. Supp. 664.

¹⁶ *Carnegie Trust Co. v. Kleybolte & Co.*, 74 Misc. 246, 134 N. Y. Supp. 69. See also *Warner v. Bonds*, 111 Ark. 238, 163 S. W. 788; *Cochran v. Burdick*, 7 Ala. App. 274, 61 So. 29; *Alexander v. Righter*, 240 Pa. St. 22, 87 Atl. 427; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585; *George v. Williams*, 27 Colo. App. 400, 149 Pac. 837.

the delivery. Whatever decision they reach is, in the ordinary case, the result of construction, and such construction as that suggested would give fullest effect to the policy suggested by the recent recognition of delivery in escrow to the payee.

TORT JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.—Section 16 of the Act to Regulate Commerce, as amended June 29, 1906,¹ provides that "if . . . the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled. . . ." The Interstate Commerce Commission is thus invested with jurisdiction of claims for all injuries which are caused by violations of the Act. The act complained of, however, must have been in violation of the statute at the time it was committed, and not merely because of some subsequent order of the Commission or change in conditions.² That this so-called "reparation" section amounts to nothing more or less than an investiture with jurisdiction over a certain number of torts (which usually were also torts at common law) was at one time clearly recognized by the Commission.³ Such a recognition might be advisable now, in view of recent hastily considered decisions⁴ of the Commission awarding damages for injuries caused by negligent misrepresentation — which generally are not torts at common law.⁵ And it should also be remembered that the Commission's jurisdiction is not exclusive of that of a common-law court, provided the plaintiff is able to sustain his cause of action in the latter without the aid of a finding by the Commission.⁶

¹ 34 STAT. AT L. 584, 590.

² *New Pittsburgh Coal Co. v. Hocking Valley R. Co.*, 26 Int. Com. Rep. 121; *In re Wool, Hides and Pelts*, 25 Int. Com. Rep. 675.

³ "Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort . . . If an injury is sustained on account of a violation of law, the proceeding is in its nature *ex delicto*, and therefore carries with it none of the features or incidents of an action *ex contractu*. In the very nature of the thing no protest is necessary where an injury is inflicted by the commission of a tort. The violation of the law produces the injury and completes the offense, and the person injured does not have to perform any conditions to entitle him to recover for the damage sustained." *Southern Pine Lumber Co. v. Southern Ry. Co.*, 14 Int. Com. Rep. 195, 197.

⁴ *Healy & Towle v. Chicago & Northwestern Ry. Co.*, 43 Int. Com. Rep. 835; *cf. Rutland & Rutland v. Chicago, Rock Island & Pacific Ry. Co.*, 19 Int. Com. Rep. 108; *Wolverton v. Union Pacific R. Co.*, 31 Int. Com. Rep. 23, 24; *Brittain v. Nashville, Chattanooga & St. Louis Ry.*, Unreported Opinion A-581.

⁵ See Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184; *cf. SALMOND, TORTS*, 3 ed., 450.

⁶ *cf. WATKINS, SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT*, 2 ed., 601. See also *Michigan Hardwood Manufacturers' Ass'n v. Transcontinental Freight Bureau*, 27 Int. Com. Rep. 32, 37: "In giving the Commission jurisdiction over reparation, it was the manifest intent of Congress to provide shippers with a method of obtaining an award of damages accruing by virtue of the violation of the Act, without resort to the expensive and tedious processes of the law."

For the effect of the award of damages by the Commission, and the means of enforcing it, as provided by the Act, see *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 724.